SERVED: February 13, 2012

NTSB Order No. EA-5615

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of February, 2012

MICHAEL P. HUERTA, Acting Administrator, Federal Aviation Administration, Complainant, v. FRED LEROY PASTERNACK, Respondent.	)	Docket SE-18133RM

OPINION AND ORDER

1. ***Background***

Respondent appeals the written decision on remand of Chief Administrative Law Judge William E. Fowler, Jr., issued on April 8, 2011.[1] By that decision, the law judge affirmed the Administrator's emergency revocation of respondent's airline transport pilot, flight instructor, and ground instructor certificates, based on respondent's alleged violation of 14 C.F.R.

[1] A copy of the order on remand and the oral initial decision are attached.

§ 61.14(b),[2] which prohibits a certificate holder from failing to remain at a drug testing site until the testing process is complete under 49 C.F.R. § 40.191(a)(2). In his decision on remand, the law judge clarified he did not find respondent failed to cooperate with any part of the testing process under 49 C.F.R. § 40.191(a)(8) as also alleged by the Administrator. We deny respondent's appeal.

A. *Facts*

Respondent, a cardiologist, a senior aviation medical examiner (AME)[3] for the Federal Aviation Administration (FAA), and a part-time pilot for Northeastern Aviation, received notification on June 1, 2007, he had been randomly selected for a Department of Transportation (DOT) drug test. Respondent last flew a Part 135 flight for Northeastern in October 2006, as second-in-command of a company Learjet. Respondent last completed required ground training as a Northeastern pilot sometime between March and June 2007. According to respondent, during all times relevant to this proceeding, respondent's primary occupation was his medical practice but he remained willing to fly if Northeastern needed him. Northeastern continued to list respondent as an authorized flight crewmember on its list of safety-sensitive employees subject to DOT-required random drug testing.

Pursuant to the instructions of his employer, respondent reported to the LabCorp collection site on June 5, 2007. LabCorp provided drug specimen collection and laboratory testing services for Northeastern. Theresa Montalvo, the collector at the testing site, processed

[2] In 2009, section 61.14(b), as it pertained to part 61 certificate holders (pilots, flight instructors, and ground instructors) was recodified without substantive change as section 120.11. See 74 FR 22649, May 14, 2009).

[3] An AME is a private physician trained and authorized by the FAA to perform airman medical examinations and to issue medical certificates.

him in accordance with DOT regulatory requirements codified at 49 C.F.R, Part 40, but respondent failed to produce a sufficient amount of urine on his first attempt. Ms. Montalvo then explained to respondent that he would have to provide a second specimen, asked him to wait in the waiting area, and instructed him to drink water. Certification of Record (C.R.) at 625, 633, 640. Ms. Montalvo testified respondent replied he could not wait and he grabbed his ID card. C.R. at 625, 633. She informed him she would have to notify his employer, he said "fine," and left. C.R. at 625-26. On cross-examination, Ms. Montalvo admitted she did not tell respondent that leaving the testing site would be considered a refusal to test under the DOT regulations. C.R. at 641.

Respondent, in contrast, denied he acted in a confrontational way or was offered water after his failed first attempt. C.R. at 982, 983. According to respondent, Ms. Montalvo directed him to the waiting area, he sat down, and subsequently realized "nothing was going to come very quickly." C.R. at 982. After waiting for approximately 10-15 minutes, respondent left because he had an appointment with a patient at his office eight blocks away. C.R. at 983, 988. Respondent informed Ms. Montalvo he needed to leave and would return to provide a sample the next morning. C.R. at 988. When asked what Ms. Montalvo said in response to this statement, he testified, "I guess she said okay." Id. Respondent returned to LabCorp later that afternoon and provided a second urine sample, which tested negative for drug metabolites.

In accordance with DOT drug testing procedures, Dr. Melvin Samuels, the designated medical review officer (MRO)[4] for Choice Point, reviewed respondent's test. Choice Point provided MRO services under contract to Northeastern. Both Dr. Samuels and Choice Point's

[4] An MRO is a licensed physician who is responsible for receiving, reviewing, and evaluating laboratory results generated for an employer under the DOT drug testing program. 49 C.F.R. § 40.3.

chief MRO, Dr. Stuart Hoffman, testified that regardless of the second negative sample, respondent's conduct in leaving the testing site after the failed first attempt without completing the test constituted a refusal under the DOT testing requirements. As such, Dr. Samuels reported the test as a refusal. On June 15, 2007, Dr. Hoffman received a phone call from respondent after respondent learned Choice Point reported his test result as a refusal. C.R. at 1137, Exh. A-4. During the conversation, respondent explained he was a doctor with aviation medical experience, as well as a pilot, and the refusal to test result would have very adverse consequences for him. C.R. at 729-30, 1137. Respondent asked whether Dr. Hoffman could do anything to rectify the situation. C.R. at 730, 1137. Dr. Hoffman told respondent there was nothing he could do, because the moment respondent left the testing facility it was considered a refusal to test. Id. Dr. Hoffman asked respondent, in light of respondent's apparent good knowledge of the testing procedures, why he left the testing facility, and respondent replied he should have known better. Id.

Kimberly Greenberg, the FAA investigator in this case, interviewed respondent about the refusal. During the interview, she felt respondent acted arrogantly. He informed her he was a senior AME but told her he had not been an MRO. C.R. at 812. Inspector Greenberg believed respondent was evasive answering questions about his drug training as a pilot, asserting all his drug training occurred long ago. C.R. at 814-15. She later learned respondent had been an MRO and had received training as recently as several months prior to the drug test.

Additionally, Craig Jordan, Northeastern's then-acting chief pilot, testified respondent properly was listed as a safety-sensitive flight crewmember for Northeastern subject to DOT drug testing requirements. Therefore, respondent had received training on the DOT drug testing procedures, including specific written guidance that leaving a collection site prior to completion

of a test would be considered a refusal under DOT test requirements. Captain Jordan also explained respondent was available to serve as a pilot, if needed, and, therefore, respondent was considered to be in a safety-sensitive position by Northeastern. While respondent's instrument currency had lapsed at the time of the drug test, Northeastern could have resurrected respondent's instrument currency in as short a time as two hours should he have been needed to fly a Part 135 flight. The chief of the FAA's drug and alcohol special investigations and enforcement division also testified that respondent was properly listed in Northeastern's pool of flight crewmembers who could be subjected to random drug testing, and was subject to DOT drug testing requirements, notwithstanding his lapse in instrument currency. Respondent never notified Captain Jordan that he was no longer available or willing to serve as a flight crewmember for Northeastern under Part 135 operations.

At the hearing, respondent testified that he served as an FAA AME from 1987 to 2008 but lost his position as a result of this enforcement proceeding. He also served as an MRO from 1989 to 2006 for five or six different companies. He denied telling Inspector Greenberg that he had no MRO experience. He also related he submitted 6-7 drug tests as chief pilot for Northeastern and as a military officer in the Air Force and Massachusetts Air National Guard. C.R. at 965.

B. *Procedural Background*

The Administrator originally served respondent with an emergency order revoking his certificates on November 20, 2007. On November 30, 2007, respondent waived the expedited procedures normally applicable to emergency proceedings. The Administrator served a second

amended emergency order of revocation on May 20, 2008.[5] The law judge held a hearing on July 30 and 31, 2008, and affirmed the Administrator's amended order. Respondent appealed that decision to the full Board. We issued our original decision on April 29, 2009, affirming the law judge.[6] On May 15, 2009, respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's decision. The Court granted the petition and remanded the case to the Board on February 26, 2010, finding the Board erred in relying on an implicit credibility determination of the law judge.[7] We now revisit this case after having remanded it to the law judge to provide more specific credibility determinations, findings of fact and conclusions of law.[8]

C. *Law Judge's 2011 Decisional Order on Remand*

In his April 8, 2011, decisional order on remand, the law judge thoroughly addressed all the issues we raised to him in our 2010 opinion and order. He engaged in a detailed discussion of the testimonial and documentary evidence produced at the hearing and made specific findings of fact relating to that evidence. He examined in detail the testimony of respondent, Ms. Montalvo, and Ms. Santana, and made necessary credibility determinations relating to the conflicts in their testimony. After a discussion of the facts on which he relied in reaching his credibility determinations, the law judge concluded by stating as follows:

> My overall assessment of respondent as a witness—having carefully listened to and reviewed his testimony, and having observed his demeanor at the hearing—is

[5] This amended order withdrew an allegation that respondent failed to appear for testing within a reasonable time after receiving notification of the test under 49 C.F.R. § 40.191(a)(1).

[6] Administrator v. Pasternack, NTSB Order No. EA-5443 (2009).

[7] Pasternack v. National Transportation Safety Board, 596 F.3d 836 (D.C. Cir. 2010).

[8] Administrator v. Pasternack, NTSB Order No. EA-5545 (2010).

> that he was evasive and, in significant ways as discussed above, inconsistent and not credible. I find Ms. Montalvo and Ms. Santana to be more credible than respondent as to the events that took place at LabCorp's testing facility on June 5, 2007.

Decisional Order at 16-17. The law judge also indicated that in prior decisions, the Board neither found the DOT Collection Guidelines to be binding on the collector, nor had taken the position that a collector's failure to provide the shy bladder procedure or inform a respondent that leaving the testing center prior to providing a sufficient sample constituted a refusal were grounds for invalidating the testing process. Id. at 19.

D. *Respondent's Issues on Appeal*

Respondent appealed the law judge's 2011 decisional order on remand. As in his original appeal to the Board in 2008, respondent renews his claim that he was not qualified to perform a safety function, and thus, was not properly subject to random drug testing. Respondent contends the law judge's determination as to the nature and effect of the DOT Guidelines and Ms. Montalvo's adherence to them is contrary to precedent and is not supported by a preponderance of the evidence. He asserts the law judge's determination of his knowledge and training on the drug testing program was arbitrary, capricious, and not supported by a preponderance of the evidence. He argues the law judge's credibility determination finding respondent not credible was arbitrary, unreliable, and clearly erroneous. Finally, he contends this proceeding exceeds the scope of the Court's order remanding the case for further proceedings.

2. *Decision*

A. *Scope of the Board's Review on Appeal*

In arguing this proceeding exceeds the permissible scope of the Board's review on remand from the appellate court, respondent "submits that the Board is constrained to find on remand that the record adequately supports his exculpatory justification." Appeal Br. at 9. We

do not read the Court's decision as so limiting. The Court rejected the Board's specifically articulated reason for dismissing the "exculpatory justification," stating:

> Because the Board expressly relied on its finding that Montalvo was "precluded" from warning Pasternack that his leaving would constitute a refusal and because that finding is not supported by substantial evidence, we must vacate the Board's decision. In so doing, we do not purport to say that the Board was required to consider Pasternack's "exculpatory justification;" it may be that 49 C.F.R. § 40.191(a)(2) is a strict liability provision. But the Board having entertained Pasternack's "exculpatory justification," and having rejected it on a ground not supported by substantial evidence, we are constrained to vacate the Board's decision.

Pasternack, 596 F.3d at 839 (citing SEC v. Chenery, 332 U.S. 194, 196 (1947)). In footnote 4 of its decision, however, the Court noted it could not deny respondent's petition based on other arguments presented by the FAA to the Court because "under well-established Chenery principles," the Board did not specifically rely on those arguments as a basis for its decision. Id. at 839.

Therefore, we do not read the Court's decision as barring us from rejecting this "exculpatory defense" based on other evidence in the record so long as we specifically articulate that reasoning in our decision. As we discussed in our previous decision remanding this case to the law judge (NTSB Order No. EA-5545 (2010)), during the July 2008 hearing, respondent asserted he relied on the instruction, or absence thereof, he received from Ms. Montalvo regarding testing procedures. As a result, we remanded the case to the law judge to make the appropriate credibility determinations, factual findings, and conclusions of law necessary to assist us in resolving whether respondent successfully rebutted the Administrator's case-in-chief.[9]

[9] For instance, while the Court rejected the Board's original conclusion that Ms. Montalvo was precluded from telling respondent that leaving the testing center would constitute a refusal, we

We narrowly tailored our remand instructions to the law judge to address the issues raised by the Court and properly resolve the matter. We did not ask him to invite or consider additional evidence but rather instructed him to clarify his credibility determinations, findings of fact, and conclusions of law based upon the record already before him. Our Rules of Practice specifically permit us to remand a case to a law judge "for any such purpose as the Board may deem necessary." 49 C.F.R. § 821.49(b). Based upon the Court's finding that the law judge made no credibility determinations, express or implied, we determined it necessary to have the law judge do so in order for us to resolve this appeal properly. Therefore, we are within the permissible scope of review. In today's decision, we intend to provide the parties with conclusive factual findings supported by substantial evidence that will be explicitly stated in this decision, in accordance with our statutory mandate and courts' interpretations of our duties.[10]

B. *Safety-Sensitive Function*

Respondent again contends he was not subject to the DOT random drug testing requirements at the time he reported for his drug test as he was not qualified to perform a safety-sensitive function since his currency and training had lapsed and he only served as a part-time pilot with Northeastern. To ensure the record is abundantly clear, we reiterate our analysis of

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(..continued)
believed it was necessary for the law judge to make findings on respondent's knowledge and training. If respondent, based upon his own training and knowledge, knew or should have known that leaving the testing center constituted a refusal, his purported exculpatory defense that Ms. Montalvo erred in allegedly failing to advise him explicitly his departure would be considered a "refusal" would not be probative in rebutting the Administrator's case-in-chief.

[10] See 5 U.S.C. § 706(2)(A); 49 U.S.C. § 46110(c); Garvey v. NTSB, 190 F.3d 571, 577 (D.C. Cir. 1999). See also Casino Airlines, Inc. v. NTSB, 439 F.3d 715, 717 (D.C. Cir. 2006) (quoting Williams Gas Processing-Gulf Coast Co. v. FERC, 373 F.3d 1335, 1345 (D.C. Cir. 2004)); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

this issue. We find respondent was a part-time pilot for Northeastern during the relevant period when he was randomly selected for drug testing. In accordance with the DOT requirements, Northeastern was obligated to ensure "[e]ach employee, including any … individual in a training status, who performs a safety-sensitive function … [is] subject to drug testing under an antidrug program implemented in accordance with this appendix. This includes … ***part-time***, temporary, and ***intermittent*** employees regardless of the degree of supervision." See 14 C.F.R. Part 121, Appendix I, section III (emphasis added).[11] Flight crewmember duties constitute a safety-sensitive function. Id. Accordingly, respondent, as a part-time or intermittent pilot designated to perform flight crewmember duties under Northeastern's Part 135 operating certificate, fell within the aegis of the DOT random drug testing requirements.

Respondent, nonetheless, continues to argue his three-month lapse in instrument currency, and his seven-month hiatus from being assigned by Northeastern as a crewmember on any Part 135 flights, demonstrates he actually was not performing a safety-sensitive function at the time he was selected for testing. The DOT drug testing requirements further state, "an employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such function." See 14 C.F.R. Part 121, Appendix I, section II.[12] Although respondent presents extensive semantic and policy arguments about why he was not performing a safety-sensitive function when he was selected for testing, the record before us—particularly the testimony of Captain Jordan and the chief of the FAA's drug and alcohol enforcement division—supports the

[11] Appendix I, section III of title 14, Code of Federal Regulations, was recodified without substantive change at § 120.105. See 74 FR 22649 (May 14, 2009).

[12] Appendix I, section II of title 14, Code of Federal Regulations, was recodified without substantive change at § 120.7(k). See 74 FR 22649 (May 14, 2009).

Administrator's contention that respondent was, as a matter of law and policy, properly deemed to be subject to random DOT drug testing. The definition in the regulation specifically includes part-time and intermittent employees. At the time respondent was selected for drug testing, he was a Northeastern employee, albeit in a part-time status, eligible to perform flight crewmember duties. Respondent's argument fails even under the most literal reading of the DOT definition of performing a safety-sensitive function, for the evidence at the hearing demonstrated respondent technically could have become qualified for a Northeastern flight in as few as several hours, and he testified "[he] considered [himself]—he was willing to become available, if they needed [him]." C.R. at 970. We conclude a preponderance of the evidence establishes respondent properly was performing a safety-sensitive function, and therefore was subject to the DOT required random drug testing program at the time he was selected and appeared for testing.

C. *Credibility Findings*

1. *Credibility Determinations in Favor of Administrator's Witnesses*

Respondent contends the law judge's credibility determinations in favor of Ms. Montalvo and Ms. Santana, and against him should be overturned as they are arbitrary, unreliable, not supported by the record, and clearly erroneous. Recently, in Administrator v. Porco,[13] we reaffirmed our long-held standard of review regarding deference to our law judges' credibility findings: we will defer to the credibility findings of law judges in the absence of a showing that such findings are arbitrary and capricious.[14] In Porco, we also discussed that the law judge's

[13] NTSB Order No. EA-5591 (2011).

[14] Id. at 20; see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Jones, 3 NTSB 3649 (1981).

credibility determination should be explicitly based upon factual findings in the record.[15]

We find the law judge's credibility determinations in this case were not arbitrary and capricious. As the law judge pointed out in support of his credibility determinations, the evidence clearly showed respondent provided inconsistent testimony and statements regarding the facts and circumstances surrounding the June 5, 2007, random drug test as well as respondent's knowledge and training on the drug testing program. The law judge specifically determined the Administrator's witnesses were more credible than respondent, as their corroborating testimony directly contradicted the majority of respondent's assertions. With regard to the testing process itself, the law judge concluded Ms. Montalvo and Ms. Santana were more credible as to the events occurring at the testing center than respondent. The law judge supported his determination with explicit facts and evidence from the record, including the following:

- He found Ms. Montalvo's contention that she had instructed respondent to sit in the waiting room and drink water in order to provide a sample more credible than respondent's contention that Ms. Montalvo simply instructed him to wait.
    - The law judge based this on the fact that Ms. Montalvo immediately reported the occurrence to her supervisor.
    - The law judge found the testing center staff had no personal interest in the outcome of the case.
- The law judge also noted it was not credible that respondent, with his life experiences as a physician, would not know to drink water to accelerate the urinary process.
- The law judge did not credit respondent's testimony claiming he sat in the waiting room for 10-15 minutes before leaving the testing facility.
    - The law judge found this contention rebutted by Ms. Montalvo's and Ms. Santana's testimony, both stating respondent immediately left the facility.
    - Ms. Montalvo's version of the timing was corroborated by her contemporaneous statement on the drug testing form (Exh A-2, C.R. 1132; Exh. A-3, C.R. at 1135) noting the time respondent left the facility was 1:20 pm; a mere 10 minutes after he signed in.

[15] Id. at 28-29.

- The law judge expressly found Ms. Montalvo did not acquiesce or say "okay" to respondent's decision to leave the testing center.

2. *Credibility Determinations as to Respondent's Knowledge as a Pilot and MRO*

In part, the law judge also found respondent's testimony not credible because the law judge found it contrary to what respondent knew or should have known as a pilot and MRO based upon his extensive history in aviation:

- The law judge found respondent received training for Northeastern pilots in 2005 on substance and alcohol abuse. As part of that training, respondent received a handbook defining what a random drug test refusal entailed.
- The law judge noted respondent had 16 years of experience as an MRO. He specifically did "not find credible respondent's testimony that he was unaware of the 2001 rule defining refusal and remained so throughout the last five years of his MRO service." Decisional Order at 16.
- The law judge also relied on respondent's admission during respondent's phone conversation with Dr. Hoffman that he "should have known better."
    - Respondent also omitted telling Dr. Hoffman he was an MRO up to one year prior to this incident, and instead selectively told Dr. Hoffman he was a pilot and an AME.
    - The law judge noted "[r]espondent's lack of disclosure of his MRO experience, which directly relates to his knowledge of the drug testing process, is suggestive of an effort on his part to conceal information of a highly relevant nature." Decisional Order at 16.

The law judge made these credibility findings tying them to specific findings of fact, as required by Porco. In reviewing all the evidence presented at the hearing, we find the law judge's credibility findings were not arbitrary and capricious. Respondent's actions throughout the investigation as well as his testimony at the hearing attempted to downplay the circumstances surrounding his personal knowledge and training on the DOT random drug testing program. He repeatedly failed to mention to various witnesses in this case the fact that he served as an MRO for 16 years. When discussing the drug test with Dr. Hoffman, respondent only mentioned his position as an AME. He outright denied being an MRO when specifically asked that question by

FAA Investigator Greenberg. Despite the rules on refusal existing for six years while he was an MRO and despite spending over four decades in aviation, he denied ever receiving training in this area. These assertions defy credulity.

3. *Challenge to Law Judge's Ability to Recall the Proceedings*

To the extent respondent contends the law judge's credibility determinations in this case are not supported by substantial evidence since so much time has passed between the hearing and this decision on remand, we disagree. Respondent relies on Hu v. Holder, 579 F.3d 155 (2nd Cir. 2009) for this proposition. We find Hu readily distinguishable from the case at hand. The Hu case involved immigration proceedings. The Second Circuit overturned the immigration judge's four-year-old credibility findings based upon the *demeanor* of the appellant. The Court held "[a] reasonable adjudicator would not rely on his four year old memory of Hu's facial expression when evaluating her credibility four years later." Id. at 159. The Court specifically noted the judge had decided 1,377 immigration cases during the four year interim, and 52% of the asylum-seekers were from China—the same country as the appellant. In the case *sub judice*, the law judge was not relying solely on demeanor evidence to make his credibility determination. He exhaustively discussed the testimony and evidence presented at the hearing. Likewise, the dockets of an immigration judge and a NTSB law judge differ significantly. The immigration judge in Hu heard well over 10 times the number of cases as Chief Judge Fowler during the four year period of time at issue. Additionally, an online search of NTSB decisions reveals that Chief Judge Fowler presided over no other cases during this period of time involving a respondent who was also a doctor. The facts and circumstances of this case involving a very uniquely qualified respondent would be memorable to a law judge long after the hearing.

After careful review of this record, we find respondent's rebuttal case—that he as a pilot

with more than 40 years' experience, co-founder and former chief pilot for Northeastern, cardiologist, MRO, AME, and military flight surgeon had no idea what the drug testing procedures entailed—nonsensical. In his decision on remand, the law judge found the Administrator witnesses' testimony credible and respondent's testimony not credible. Given the evidence presented at the hearing and the well-articulated findings of the law judge in his decision on remand based upon that evidence, we find the law judge's credibility determinations were not arbitrary and capricious.

D. *Nature and Effect of the DOT Guidelines*

Respondent argues the law judge erred in holding the DOT Guidelines have no bearing on the outcome of the case. In his decision on remand, the law judge expressly found the DOT Collection Guidelines were not binding on the collector and did not "somehow invalidate[] the testing process or exculpate[] the person being tested from the consequences of his or her failure to comply with the regulations." Decisional Order at 19.

We find these DOT Collection Guidelines are just that—guidelines, and not regulations. Thus, they do not carry with them the force of a regulation to make them binding on the collector. In reaching this conclusion, we first note the Guidelines state in the introduction that the "information contained in this publication should not be used to interpret the legal requirements of the actual rule." Department of Transportation Urine Specimen Collection Guidelines at 3.

Additionally, we believe it necessary to compare the language of the Guidelines with the language of the applicable regulations in reaching our conclusion. The law judge's decision on remand discussed steps 2-4 of the shy bladder procedure from the DOT Collection Guidelines but omitted reference to step 5. We believe step 5, which states in relevant part, "[t]he collector

must specifically tell the employee that he or she is not permitted to leave the collection site and if they do so, that it will be considered a refusal to test" (Id. at 20.) is relevant to the analysis. While the Guidelines state the collector must notify the individual that leaving constitutes a refusal, the relevant regulation section contains no such requirement for the collector. Under 49 C.F.R. § 40.193, "*What happens when an employee does not provide a sufficient amount of urine for a drug test?*" subpart (b) states,

> (b) **As the collector**, you **must** do the following:
>
> > (1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (see § 40.65(b) and (c)).
> >
> > (2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three-hour period begins and ends.
> >
> > (3) If the employee refuses to make the attempt to provide a new urine specimen **or leaves the collection site before the collection process is complete**, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. **This is a refusal to test.**
> >
> > (4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER.
> >
> > (5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

(emphasis added). Thus, the regulation places no requirement on the collector to affirmatively notify the individual that leaving the testing facility constitutes a refusal to test. The regulation governing the individual's actions, however, places that responsibility—to remain at the testing center—on the employee. Section 40.191, "*What is a refusal to take a DOT drug test, and what*

are the consequences?" states, in relevant part,

> (a) As an employee, you have refused to take a drug test if you:
>
> …
>
> (2) Fail to remain at the testing site until the testing process is complete.

Respondent also argues 49 C.F.R. § 40.33 requires a collector be knowledgeable of the DOT Guidelines and be trained on procedures such as shy bladder procedure, asserting the use of the word "must" creates "an obligation tantamount to its regulatory equivalent." Appeal Br. at 11 n.4. However, respondent's argument overlooks § 40.209. Section 40.209 specifically discusses procedural problems that do not result in the cancellation of a test and do not require correction. Subsection (b) states,

> No person concerned with the testing process may declare a test cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test. Matters that do not result in the cancellation of a test include, but are not limited to, the following:
>
> …
>
> (3) The collection of a specimen by a collector who is required to have been trained (see § 40.33), **but who has not met this requirement**.

Therefore, after examining 49 C.F.R. §§ 40.191, 40.193, and 40.33, we find the plain language of the regulation clearly places the responsibility to remain at the testing center on the individual employee rather than the collector. Ms. Montalvo informed respondent he needed to remain in the waiting room and drink water, as was her responsibility under § 40.193(b)(2). We previously have held that a collector need not specifically inform the individual that he or she must drink 40 ounces but must simply inform the individual that he or she may drink water.[16] Furthermore, although § 40.33 requires a collector to be knowledgeable of the Guidelines, if the

[16] Administrator v. King, NTSB Order No. EA-4997 (2002).

collector is not trained in the Guidelines, then such a lack of training is not deemed, under § 40.209(b), to have a significantly adverse effect on the right of the employee to have a fair and accurate test. Thus, the regulatory language supports the law judge's conclusion that the Guidelines were not binding on Ms. Montalvo, but rather the regulation itself was binding on respondent.

In our decision remanding this case, we asked the law judge to consider cases such as Administrator v. Rojas[17] and Administrator v. Heyl,[18] which both involved refusals where the respondents contended they had permission not to test. On remand, the law judge analyzed the cases of Administrator v. Heyl and Administrator v. King, supra, in concluding that a failure on the part of the collector to explain the shy bladder procedures prior to the individual leaving the testing center did not negate the refusal. Respondent argues, by way of analogy, the guidelines should be binding on Ms. Montalvo. He provided citations to several cases where a respondent's failure to adhere to Advisory Circulars was used as evidence against the respondent by the FAA.[19] In our decision remanding the case to the law judge, we noted other cases exist involving a respondent's failure to adhere to certain guidance, and negative consequences that result from such a failure.[20] We find no similar doctrine currently exists in our jurisprudence for drug testing scenarios, such as the case at hand, and we decline to adopt any such doctrine for

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[17] NTSB Order No. EA-5496 (2009).

[18] NTSB Order No. EA-5420 (2008).

[19] See Administrator v. Nyerges, NTSB Order No. EA-5483 (2009); Administrator v. McCarthney, NTSB Order No. EA-5304 (2007); and Administrator v. Cannavo, NTSB Order No. EA-5098 (2004).

[20] See, e.g., Administrator v. Brasher, 5 NTSB 2116 (1987).

this situation since we find the regulation clearly defines the responsibilities of the individual.[21]

Assuming, *arguendo*, these DOT Collection Guidelines were binding on Ms. Montalvo, we find respondent's knowledge, training, and experience on the drug testing process as a pilot, former chief pilot, part-owner of the company, AME, and MRO sufficiently obviate the argument that Ms. Montalvo's failure to inform him of the consequences of leaving the testing center excused his departure to the extent that he did not violate section 40.191(a)(2).

Notwithstanding the Court's holding that Ms. Montalvo was not precluded from explaining the shy bladder procedures to respondent, we find the law judge's credibility determinations and findings of fact establish Ms. Montalvo's version of the events at the testing center were more credible than respondent's. Likewise, we find the law judge properly concluded respondent knew or should have known about the drug testing procedures, given his extensive history as a pilot and MRO for the FAA. Based upon all this, we concur with the law judge's conclusion of law rejecting respondent's exculpatory defense that he left the testing center without knowledge such departure would constitute a drug test refusal.

[21] While we find the Guidelines were not binding on Ms. Montalvo, we would encourage the FAA to work with the DOT Office of the Secretary to align the requirements for a collector under 49 C.F.R. § 40.193 with the DOT Guidelines—making it incumbent on the collector to clearly inform those undergoing drug testing that failure to complete the testing process constitutes a refusal to test. Providing clear regulatory language on this aspect of the collection process would remove any uncertainty from future appeals.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's decisional order is affirmed; and

3. The Administrator's emergency revocation of respondent's airline transport pilot, flight instructor, and ground instructor certificates is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

Served: April 8, 2011

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* *

J. RANDOLPH BABBITT,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket SE-18133RM

FRED LEROY PASTERNACK,

Respondent.

* *

DECISIONAL ORDER ON REMAND

Served:

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(BY CERTIFIED MAIL AND FAX)

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William E. Fowler, Jr., Chief Administrative Law Judge: In this proceeding, respondent has appealed from a certificate action, by which the Administrator of the Federal Aviation Administration ("FAA") revoked his airline transport pilot ("ATP"), flight instructor and ground instructor certificates pursuant to § 61.14(b) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.), based on his alleged "refusal," under 49 C.F.R. § 40.191, to submit to random drug testing implemented in accordance with FAR Part 121, Appendix I, in June 2007.[1]

[1] Under then-FAR § 61.14(b) (which was recodified without substantive change at FAR § 120.15(b) in 2009), refusal by the holder of certificate issued under FAR Part 65 who is subject to testing under the drug and alcohol testing program of the Department of Transportation ("DOT") to undergo such testing is grounds for the suspension or revocation of any certificate, rating or authorization issued under that part, and the FAA's Enforcement Sanction Guidance Table (FAA Order 2150.3B, Appendix B) provides that the appropriate sanction for refusal by the holder of a certificate issued under FAR Part 61 to submit to any drug or alcohol test is revocation (*see* Fig. B-5-v.(1) at p.B-38).

At the conclusion of an evidentiary hearing held on July 30-31, 2008, I rendered an oral initial decision ("OID") affirming the Administrator's certificate revocation. On an appeal by respondent, the full five-member Board affirmed the OID in NTSB Order EA-5443 (served April 29, 2009). Respondent then appealed the Board's decision to the United States Court of Appeals for the District of Columbia Circuit, which, on February 26, 2010, vacated that decision and remanded the matter to the Board for further action. 569 F.3d 836.

In response to the District of Columbia Circuit's remand directive, the Board, in NTSB Order EA-5545 (served September 2, 2010), remanded the case to me to make, clarify and expound upon those credibility determinations, findings of fact, and conclusions of law that are pertinent to an assessment of whether respondent refused to undergo drug testing under 49 C.F.R. § 40.191. Such analysis appears below.

I.

At the outset, I note that I had previously found in my OID that respondent was a proper subject of DOT's drug testing requirements by virtue of his status as an intermittent pilot performing flight crew duties in a safety-sensitive function for Northeastern Aviation Corporation ("Northeastern"), and that the Board concurred in that finding in NTSB Order EA-5443 (at 8-11). I now reaffirm that determination here.[2]

The matters on which the Board seeks additional clarification and analysis principally relate to my evaluation of conflicting evidence and credibility findings that resulted in the determination that a refusal on the part of respondent to undergo random drug testing occurred on June 5, 2007.

At the hearing, the Administrator presented as witnesses Donna Schmitt, Northeastern's Flight Department Administrator, who serves as its Designated Employee Rep-

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(49 U.S.C. § 44709(d)(3) provides that, "the Board is bound by . . . written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds [it] arbitrary, capricious, or otherwise not in accordance with law.")

The Administrator has alleged in this case that respondent should be deemed to have refused drug testing under 49 C.F.R. § 40.191(a)(2), for failure to remain at the testing site until the testing was complete, and/or 49 C.F.R. § 40.191(a)(8), for failure to cooperate with a part of the testing process (*e.g.*, refusing to empty pockets or wash hands when directed by the collector, behaving in a confrontational way that disrupts the collection process).

[2] In this regard, I have observed that District of Columbia Circuit noted in its remand decision that respondent had, in connection with his appeal to that Court, "contend[ed] that he was not [subject to] random drug testing in June 2007 because he was 'not current or qualified to perform as a pilot,'" but that it "need not consider that argument," because it was vacating the Board's decision on other grounds (836 F.3d at 268 n.1), and that the Board, in its subsequent remand order, noted that "[t]he Court's decision did not review th[at] portion of [NTSB Order EA-5443]" (NTSB Order EA-5545 at 6). Since it is feasible that respondent may again raise the issue of the applicability of the DOT drug testing program to him during the course of this litigation, I believe that it is both appropriate and advisable at this time for me to express a reaffirmance of my earlier finding that the Administrator properly determined that respondent was subject to such testing.

resentative ("DER"); Theresa Montalvo, a Patient Service Technician for LabCorp, who served as the collector on duty for respondent's drug test; Cecilia Santana, a LabCorp Site Coordinator, who was on duty at the collection site that day; Melvin Samuels, M.D., who is a Medical Review Officer ("MRO") employed by Choice Point, the consortium that oversees Northeastern's drug testing program; Stewart Hoffman, M.D., Choice Point's Chief MRO, who is Dr. Samuels' supervisor; Craig Jordan, Northeastern's Assistant Director of Operations, who was its Acting Chief Pilot in June 2007; Kimberly Greenberg, the FAA's lead enforcement investigator in this matter; Karen Leamon, the manager of the FAA's Drug Abatement Division, Aerospace Medicine, who is Ms. Greenberg's supervisor; and Peter Montemurro, Northeastern's General Manager. Both respondent and Harriet Lester, M.D., who is the Regional Flight Surgeon for the FAA's Eastern Region, testified at the hearing on respondent's behalf.

II.

Certain basic facts in this case are not in dispute. Respondent was selected for random drug testing by Choice Point, and after Ms. Schmitt received notification of this, she informed respondent of his selection by telephone on June 1, 2007. At that time, respondent did not have in his possession any Custody and Control Forms ("CCFs") containing preprinted identifying information for Northeastern and Dr. Hoffman, and Ms. Schmitt and respondent arranged that she would mail such forms to him and he would appear for the drug test as soon as he received them. Respondent's principal occupation is a physician with a specialty in cardiology, whose office is located in New York, New York, approximately eight or nine blocks from the LabCorp facility to which he reported for drug testing on June 5, 2007. Respondent arrived at that testing facility at approximately 1:00 p.m. on said date, and there was one person ahead of him when he signed in. After he was called, respondent went to the bathroom and produced a urine specimen measuring less than 45 milliliters ("mL") — in fact, significantly less — which was, as a result, of insufficient quantity for testing. Respondent left the facility without providing another urine specimen, but later returned there at approximately 4:00 p.m., at which time he produced an adequate urine sample, which tested negative.

Respondent's principal defense in this matter is that he should not be deemed to have refused a drug test when he departed the LabCorp testing facility without producing an adequate urine specimen because he was, at the time he left the site, without knowledge that such action would constitute a refusal. With regard to that rebuttal/exculpatory defense, it is also undisputed that Ms. Montalvo neither expressly provided respondent with "shy bladder" procedure instructions after he produced the first, inadequate, urine sample,[3] nor specifically informed him prior to leaving the LabCorp testing facility that, if he did so before producing another urine specimen, he would be considered to have refused a drug test.

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[3] Together, 49 C.F.R. §§ 40.193(a) and (b) direct the collector, when "an employee does not provide a sufficient amount of urine to permit a drug test (*i.e.*, 45 mL of urine)," to "[d]iscard the insufficient specimen" and "[u]rge the employee to drink up to 40 ounces of fluid, distributed reasonably up to a period of three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first."

A review of the evidence pertinent to respondent's exculpatory defense appears below.

A. Witness Testimony

At the hearing, Ms. Montalvo testified that respondent was on a cell phone when she called him back for testing, and that she told him to shut it off because cell phone use is not permitted in the testing facility (Tr. 61). She related that she explained the drug testing procedure to respondent, specifically telling him that he was to wash his hands, empty his pockets, select a specimen cup and go to the bathroom, and that he would need to provide a urine specimen of at least 45 mL (*id.* 61-62), and that this occurred at 1:10 p.m (*id.* 65). Ms. Montalvo testified that, after respondent returned with an insufficient specimen, she advised him that he would need to provide a second specimen, and "would have to wait in our waiting area, [in] which we have a water cooler;" that respondent replied "[t]hat he couldn't wait" and "grabbed his ID;" that she "told him I would have to notify [his] employer;" and that, in response, "[h]e said, fine" and "walked out" of the facility (*id.* 63-64). She related that, after respondent departed the facility, she notified Ms. Santana as to what had occurred and was instructed to call respondent's employer, and that she then spoke by phone with Mr. Montemurro, who told her that he would call her back after he spoke with his supervisor (*id.* 64-65). I asked Ms. Montalvo to describe respondent's overall attitude and demeanor, and her response was, "[h]e was in a rush" (*id.* 71). When I asked her to elaborate, she stated that, "when he provided the first specimen and it wasn't sufficient, I told him he had to sit down in the waiting room and drink water. He says, I can't, I have to go. I have a busy schedule" (*id.*).

Ms. Montalvo testified that respondent returned to the LabCorp testing facility "after 4:00 p.m." that day, and "came directly to the back to where I was in the room, telling me that he wanted to proceed with the test," but she "explained to him that we couldn't do that. I'd have to call the employer first" (*id.* 65). She related that she then called Mr. Montemurro, and he told her, "if the donor is there, just proceed with the test" (*id.* 66). Ms. Montalvo related that respondent was on a cell phone and that she instructed him to shut the cell phone off, after which he proceeded to the bathroom and produced an adequate urine specimen (*id.* 67).

On cross-examination, Ms. Montalvo stated that the reason she did not she did not relate the "shy bladder" procedure instructions to respondent after he produced the first, inadequate, urine specimen was that "[h]e never gave me enough time to explain the whole procedure" (*id.* 78), and she reiterated that, when she informed him that he would have to sit in the waiting area and drink water from the water cooler and then provide her with a second specimen, he responded, "'well I can't wait, I have to go,' grabbed his ID and walked away," and that she said to him, "I'm going to have to call your employer" (*id.* 78-79).

Ms. Santana, the site coordinator, testified that she was sitting at the front desk of the LabCorp testing facility when respondent arrived there (*id.* 99). She stated that she remembered respondent signing in and being called back by Ms. Montalvo for testing, and that "[h]e went to the back and I remember [him] just coming out, straight out through the door with his cell phone and a backpack," and that his demeanor was "very fast,"

which struck her as unusual (*id.* 98). When she was asked if she tried to say anything to respondent, she replied, "I couldn't get a chance to try to get to [him] because he was so — he was on his cell phone, and with a backpack, and he rushed out" (*id.* 99). Ms. Santana stated that Ms. Montalvo "c[a]me to me and she had told me what had gone on in the back with [respondent]. And she told him about washing his hands, going to the bathroom, providing the urine sample. He came out with an insufficient [specimen] . . . . And she had told him to go to the front, drink water, have a seat, to drink some water. And [he] did not let her finish, and he stormed out" (*id.*). Ms. Santana testified that respondent had not been given permission to leave the LabCorp testing facility, and that "he just left" (*id.* 100). She further testified that respondent returned later that day, and "sa[id] that he was told by his employer to come back to have the drug test done" (*id.*). Ms. Santana related that she was asked by Ms. Montalvo whether respondent could be retested; that she told Ms. Montalvo to call his employer; and that, after speaking with respondent's employer, Ms. Montalvo informed her that the employer said to go ahead and perform the test (*id.* 100-01). When Ms. Santana was asked on cross-examination whether either she or Ms. Montalvo mentioned to respondent that it would be considered a refusal if he left the facility, she responded, "if [he] left the facility without letting the collector finish what she was about to say or not even giving us the appropriate time to speak to [him] while [he was] with a cell phone and [he] ha[d] a backpack and [he was] leaving out [of] the facility, how can we explain it" (*id.* 104).

MRO Samuels testified that he determined that respondent had refused a drug test after receiving and reviewing the CCF — specifically the collector's remarks that respondent had produced a urine specimen of insufficient quantity and did not provide a second specimen before leaving LabCorp's testing facility (id. 120-21) — and that the testing of the specimen respondent provided after returning there later that afternoon was "illegal" and "shouldn't have been done at all . . . . [b]ecause once he leaves, it's a refusal to test. And he's not allowed to give another test without consulting with a substance abuse professional and without going through the protocol that one has to do, to be allowed to test again" (id. 122).

Chief MRO Hoffman stated in his testimony that he concurred with Dr. Samuels' assessment that "[t]he moment [respondent] walked out of the collection site, without completing the test, that was [a] refusal to test" (*id.* 167). Dr. Hoffman further testified that respondent subsequently called him to discuss the matter, and indicated that, in addition to being a pilot, he is a cardiologist and an aviation medical examiner ("AME") (*id.* 167-68). Dr. Hoffman related that respondent stated to him "that the . . . refusal to test result would have some very adverse consequences for him. And he asked me if there was anything I could do to rectify the situation," and Dr. Hoffman said that he replied, "there was nothing I could do, that the moment he left that was a refusal to test. And I asked him, you know, in view of his training and knowledge he must — he probably had good knowledge of the testing procedures and a refusal to test. And why did he leave? And he responded that he should have known better" (*id.* 168). Dr. Hoffman further testified that, if respondent had informed him that he had experience as an MRO, "[i]t would have just solidified my opinion that — if he — he should have known" (*id.* 169). On cross-examination, Dr. Hoffman was asked his opinion as to "how Ms. Montalvo handled the shy bladder procedure, as — with regard to the regulatory requirements," and he responded, "[s]he — Ms. Montalvo performed everything that she could have

performed in view of the fact that the donor walked out on her" (*id.* 174). When asked, "In all the years that you've been performing these types of drug tests for DOT, have you ever come across a scenario where an individual came in, gave an insufficient quantity, left, and then came back again and gave a sufficient quantity that turned out to be negative" (*id.* 189) Dr. Hoffman replied "[y]es," and stated that, in his career, "I think there were about four, and possibly five, situations like that" (*id.* 189-90). He specifically recalled one instance in which an individual who left the testing facility "to pick up [a] child from school" came back later to provide another specimen and related that, in that case, "[i]t was a refusal to test" (*id.* 190).

Mr. Jordan, Northeastern's Director of Operations and its Acting Chief Pilot during the time in question, testified that his duties included (and continue to include) being that company's alcohol and drug program supervisor (*id.* 208). He related that Northeastern's initial drug and alcohol training for pilots is conducted by Choice Point, that such training covers what constitutes a refusal to take a drug test under the FARs, and that respondent completed that training on May 3, 2005 (*id.* 210-11). Mr. Jordan further testified that a handbook, setting forth alcohol and drug-related policies and regulations, including what constitutes a refusal to test, is given to all Northeastern pilots (*id.* 211); that the handbook specifies that "[f]ail[ure] to remain at the testing site, until the testing collection process is complete," constitutes a refusal (*id.* 212); and that respondent acknowledged receiving that handbook on April 18, 2005 (*id.* 213).

FAA Investigator Greenberg testified that she sent a letter of investigation ("LOI") to respondent on July 12, 2007, and that, in response, he transmitted to her by fax on July 16, 2007 an affidavit relating to the incident, which was dated June 15, 2007 (*id.* 246-47, 254), in which, she stated, "[h]e affirm[ed] that his conduct constituted a refusal to test upon leaving the collection site, before the testing process was concluded" (*id.* 248). Ms. Greenberg testified that she interviewed respondent on July 17, 2007, and that, during that interview, he told her that he "now understands that leaving the collection site constituted a refusal," based on information he learned after the June 5, 2007 incident occurred (*id.* 251-52). She also related that respondent told her at the interview that he was both a Senior AME and an independent medical sponsor for the FAA (*id.* 249-50), and that he responded "No" when she expressly asked him whether he had any training or background as an MRO, although she later learned that he had MRO training in 1989 and served as an MRO for three different companies between 1990 and 2006 (*id.* 250). When asked to give her impression of respondent at the interview, Ms. Greenberg stated, "I didn't feel that he was — he was evasive, he was non-committal. I didn't feel he was being forthright. He himmed [*sic*], he hawed. He could not recall, he could not recollect, he could not get his fingers on, he could not find, he was very evasive" (*id.* 253). Ms. Greenberg was then asked to state the specifics upon which that opinion was based, and responded (*id.* 253-54):

> I specifically asked him, did you receive — when was the last time you received training with the company? And he stated maybe within the last year. I asked — and then it turns out that he got training as early as March 29th 2007, just two months prior to the actual drug test.

> I asked [respondent], had you been given drug and alcohol handouts by the company about their policy? And he stated possibly, it was long ago. He couldn't recall.
>
> And, you know, it was April 2005 that he did in fact receive those handouts and signed that he did receive this — these handouts on drug and alcohol training. The biggest thing is that I asked him, point blank, have you had MRO training? And he said no. And not only had he had training, he acted in the capacity, over the course of 16 years, as an MRO, which was a bold-faced untruth.

On cross-examination, Ms. Greenberg was asked whether she made a determination that Ms. Montalvo followed proper procedures and regulatory requirements as a collector at a drug testing facility, and she opined that Ms. Montalvo had done so, based on an interview with Ms. Montalvo, in which Ms. Montalvo told her "that she was not afforded the opportunity to discuss the procedures because [respondent] walked out on the process before she could have the dialogue" with him (*id.* 261-62). When asked, "Is it your understanding, based on your entire investigation and interview process, that at the time [respondent left LabCorp's testing facility] . . . , he knew that he would be refusing that drug test on June 5th, 2007," Ms. Greenburg replied in the affirmative (*id.* 272), and, when asked what that understanding was based on, she stated (*id.* 272-73):

> The basis is based on the training that he received from Northeastern Aviation. [Respondent], we have demonstrated, and I collected evidence that showed, that he went through an online training course that discussed, based on the handbook, what the criteria is for refusing to take a test. Therefore, he had — he should have known.
>
> There's a reasonable expectation he had knowledge. He signed that he received the handbook. His chief pilot supervisor signed a statement that he completed and passed this training. He had recurrent training. I have — I am confident that he had the knowledge, based on his training as an employee with the company, to know these regulations.

Ms. Leamon, the FAA's Drug Abatement Division manager, testified that there "was a refusal when [respondent] left the collection site before the collection process was completed" (*id.* 300), and, when asked whether Ms. Montalvo had to tell respondent that leaving the facility would constitute a refusal to test, Ms. Leamon responded "No"(*id.* 300-01). She further testified that, under FAR § 40.191, "one of the refusals is if you leave the collect — or you fail to remain at a collection site until the collection process is completed. The next step after you have a refusal is that the person had to complete the return to duty process, before the employer may authorize another test to be done. And that other test has [to be] the return to duty test. And it cannot be authorized until after the substance abuse professional has advised that the employee has complied with the education and the treatment prescribed" (*id.* 301). Ms. Leamon also stated that the fact that respondent provided a second specimen when he returned to Lab Corp's testing facility does not diminish the impact of his prior refusal (*id.* 304).

Mr. Montemurro, Northeastern's General Manager, testified that he recalled that respondent called him and "asked me to call the lab and talk to them about him providing a sample" (*id.* 364). He then "spoke to a woman. I don't recall her name. I'm not really sure exactly what she said, but the gist of it was that [respondent] had left, and came back, and wanted to give a sample. I asked her if that was okay, if that was normal. I'm not really sure how she responded. I basically said if it's, if it's okay with you, it's okay with me. Pretty much, that was it" (*id.*). When Mr. Montemurro was asked, whether, by giving such approval "to this . . . second test after [respondent] left the collection site, [he was] determining, on behalf of Northeastern, that [respondent]'s conduct [in] leaving the collection site did not constitute a refusal to submit to a drug test under the regulations," he replied "No. I was providing my consent to what they were going to do" (*id.* 364-65).

Respondent, in his testimony, related that he was a Senior AME from 1987 to 2008, but was terminated as an AME as a result of this matter (*id.* 390-92), and was neither trained nor involved in DOT drug testing procedures in that role (*id.* 395-96). He also stated that he was trained as an MRO in 1989, served as one from 1990 to 2006, and, during that time, performed MRO services for three companies — Seaboard Systems, World Jet and International Jet Interior — the last of which was his sole client before he ceased providing MRO services in 2006 (*id.* 396-98, 447). He denied that he would have told Ms. Greenberg that he had no MRO experience (*id.* 396). He further related that he served in the Air Force and the Massachusetts Air National Guard (*id.* 390), was Northeastern's Chief Pilot from June 1980 to August 1987 (*id.* 402), and underwent "six or seven" drug tests, of which "two or three" were performed in a civilian setting and the rest occurred in connection with his military service (*id.* 401-02).

Respondent testified that he received the preprinted CCFs that Ms. Schmitt had mailed to him at around 4:30 p.m. on June 4, 2007, and he "checked the website for the lab. The lab stopped taking, at that time, as I remember, specimens after 3:00," so he decided to go for testing the next day (*id.* 417). He stated that, on June 5, 2007, he rode his bicycle to the residence of a homebound patient on the West Side of Manhattan (*id.*); consumed two glasses of water while he was there (*id.* 418); stopped at a hospital with which he was affiliated and had a cup of coffee there (*id*); and proceeded to the LabCorp testing site "thinking that I was hydrated sufficiently to provide an adequate specimen" (*id.* 418). Respondent denied that he acted in a confrontational way that may have disrupted the collection process at the testing site (*id.* 419). He related, "I provided a urine specimen. The collector came in, took a look at the urine specimen, and said it wasn't sufficient. I said it's all I have" (*id.*). When asked for Ms. Montalvo's response, he stated, "She said not enough. I said it's all I have. She said, well, why don't you wait in the waiting room to provide another specimen" (*id.* 419). When respondent was asked if he had been told to wait in the waiting room for three hours and drink 40 ounces of water, he replied "No," and he denied being offered any water at any time (*id.* 420). He testified that he "was just directed to wait in the waiting room in order to provide another specimen" (*id.*).

Respondent said that he then "went to the waiting room [and] . . . sat down. I realized that nothing was going to come very quickly. . . . I knew that I had an appointment in my office at 2:30 . . . for an aviation medical examination" (*id.* 419-20). He further testified that "I'm thinking that it's now probably anywhere of 1:30, nothing is going to happen very

quickly with respect to urine production. I had an appointment at 2:30, that, you know, whatever is in my body is in my body, it's just there. And that what I wanted to do was I wanted to leave and return to provide an adequate specimen" (*id.* 424). When this judge began to ask respondent why he needed to leave the testing facility one hour before his scheduled appointment, he interjected, "I had to prepare for the, for the person. And I figured again, even during the course of the hour, I had consumed a lot of liquids and if it wasn't coming out in a sufficient quantity by the time I go to the collection site at 1:00, I didn't think that I was going to have a sufficient specimen within an hour" (*id.*). Respondent stated that he waited in the waiting room until Ms. Montalvo came out from a different area of the facility, that he was seated, and that he "got up and I said, you know, I mean I have to go and come back" (*id.*). In response to this judge's question, "How long had you been there, at that time," respondent replied, "Probably maybe ten, fifteen minutes. I'm not certain," and when I asked him what time this would have been, he stated, "Somewhere around 1:30, 1:40 perhaps" (*id.* 425). Respondent testified that Ms. Montalvo asked him when he expected to return and, "I thought I — I knew I was going to have a full bladder in the morning. I didn't think that there was anything I could do to myself to change what was in me. So I said probably tomorrow morning," and, when I asked respondent what Ms. Montalvo's response was, he answered, "I guess she said okay." (*id.*). Respondent denied that he grabbed his identification card as he departed (*id.* 425-26).

When respondent was asked, "Did [Ms. Montalvo] "say anything to you, at that point, that if you left, it will be considered a refusal," he replied "No," and stated that she merely asked him when he was coming back (*id.* 425).

Respondent testified that, after he finished the scheduled appointment at his office with the aviation medical examinee, "I was about to go to urinate, because I had the urge to urinate. And I said, no, this is ridiculous, you know, I want to get this over with. I'm not going to wait until tomorrow morning. I'm ready to go now" (*id.* 426). He stated that he got on his bicycle, thought "I'm only a couple of blocks, couple of minutes from the collection site" (*id.* 426), and "rode over to the collection site. It was shortly after 4:00. There was a sign on the door, no drug testing after 3:00, or something like that. I went in. I said, you know, I noticed the sign, and they said, no, it's okay, we'll do it, but we're just waiting for a phone call from [Mr. Montemurro]" (*id*). Because his experience told him that "waiting for people to call back late afternoon is not very good," and he wanted to get the drug test done, he asked for permission to place a call to Mr. Montemurro (*id.*). Respondent eventually contacted Mr. Montemurro on that individual's cell phone and arranged for him to talk with Ms. Montalvo, after which respondent produced an adequate urine sample for testing (*id.* 427). Respondent said that "I did everything the way I had experienced it in the past, and I left feeling everything was done properly and that I refused absolutely, well, I wasn't even considering that I refused anything until [June] 15th, when [Ms. Schmitt] called me to tell me that the test came back as a refusal" (*id.*). Respondent believed that "I didn't refuse anything. I provided the specimen. And everything was done according to the way it's been done in the past" (*id.* 428).

Respondent related that he then attempted to contact the MRO at Choice Point to discuss the matter, and that, while he was waiting for a call from the MRO, he spoke by phone with an individual he identified as Nicholas Lomangino, whom he described as "a regional flight surgeon for the FAA in New York who went onto Washington, DC, who . . .

was involved with their drug programs" (*id.* 430). Respondent stated that Mr. Lomangino guided him to 49 C.F.R. § 40.191 on an internet site, "where it listed leaving the site, leaving the collection site as a refusal," (*id.* 431), and that he was reading this when Dr. Hoffman called him and it prompted him to tell Dr. Hoffman "it's in black and white, you know, I guess I did it" (*id.*). Respondent testified that he then "asked if there was anything I could do about this, at this point. And [Dr. Hoffman's] answer was no. . . . I just wondered, I was looking for something procedural that I was ignorant about. . . . I simply asked is there anything that can be done, can I, I can do it, or can be done at this point. I mean I know full well what the implications of refusal are" (*id.* 432). Respondent also related that "Dr. Lomangino, he suggested, because of my relationship with the FAA . . . . [a]s an airman medical examiner, that I contact my regional flight surgeon," who was Dr. Lester, and that one of Dr. Lester's suggestions was that he "write an affidavit in terms concerning the events that transpired, and have it notarized" (*id.*432-33). He stated that he did this, and that the resultant affidavit was the one he provided to Ms. Greenberg in response to the LOI (*id.* 433).

When asked, "[I]f you had been told by Ms. Montalvo, after the first insufficient sample or specimen, that your leaving the facility would have been considered a refusal, would you have left," respondent replied, "If that were the case, until I provided a sufficient specimen, I'd be there today," and that, "if it were a choice between keeping the [AME] appointment or staying on the site . . . . [b]ecause the consequences of keeping the appointment would be a refusal, I would have remained at the site" (*id.* 442-43).

On cross-examination, respondent confirmed his service as an MRO between 1990 and 2006. When asked, "The rule defining a refusal was published in 2001. Are you aware of that," he responded, "I subsequently became aware of it. The current regulation," and, when asked, "So you practiced for five year[s] as an MRO while this regulation was in effect, isn't that correct," he answered "Yes" (*id.* 448).

Regarding the usage of a cell phone while at LabCorp's testing facility in June 5, 2007, respondent stated that he initially "thought to myself [that] might have been possible. What I do, my, my general practice is when I'm not in my office — now, I live above my office, so it's one phone system. And when I'm not in the office, I call forward to my cell phone. So, in essence, my cell phone is an extension of my medical practice. . . . And I'm thinking, well, you know, [that] might have been" (*id.* 420). But "then I realize[d] that I have phone records on the cell phone. I grabbed the cell phone record and it didn't show any incoming or outgoing calls . . . . between 12:42 on June 5th" and "3:57 p.m." (*id.* 421-22). He also stated that the cell phone records showed that "there was one at 4:09, an incoming call for what's listed as a minute at 4:09; an incoming call at 4:21; and another one at 4:23," and that it was possible that he was receiving calls on his cell phone on his return visit to the LabCorp site, during which the second urine specimen was provided (*id.* 422). On cross-examination, respondent answered the question, [T]he records you provided are for the telephone number 917-239-1213, isn't that correct," in the affirmative, and, when asked, "Are you aware that on [Mr.] Montemurro's phone list, you're cell phone isn't listed as that number . . . . do you know the number 917-389-1206," and, "[I]sn't [that] a cell phone of yours," he replied, "Not currently. It may have been in the past," and added, "I've never had two cell phones concurrently or two cell phone numbers concurrently" (*id.* 460-61). When

specifically asked "on the date of June 5th, 2007, did you have more than one cell phone," respondent answered, "No . . . . [p]ositively" (*id.* 461).

Dr. Lester, the FAA Regional Flight Surgeon, testified that respondent spoke with her by phone around June 15, 2007, and e-mailed her on June 16, 2007, to inform her about the events of June 5, 2007 and seek advice, and that she suggested that he retain counsel and "capture his, his recollections in writing" (*id.* 479-80).

B. Documentary Evidence

Exhibit A-3 is a copy of the CCF relating to this matter, in which, in the section to be completed by the collector, Ms. Montalvo wrote, in the area provided for remarks, "Spoke with Peter [Montemurro] 1^{20}pm, 1st sample insufficient specimen pt left and returned → 2nd specimen 4^{16}pm approved by Peter Montemurro." In the section to be completed by the MRO, Dr. Samuels checked the box designated "REFUSAL TO TEST," and entered in the remarks area "QNS [(quantity not sufficient)] 2nd specimen refused."

Exhibit A-2 is a copy of a handwritten statement relating to the incident which was written by Ms. Montalvo on June 5, 2007 (*see* Tr. 68). In that statement, Ms. Montalvo relates that she entered Room 3 with respondent at 1:10 p.m., asked him to select a specimen cup and to wash his hands, and explained that "we would need at least 45 mL of urine in order for the specimen to be sent out" for testing. She states that she "blued the toilet" and waited outside the restroom "until [respondent] was done" and that, when he came out, there was an insufficient amount of urine — "only a few droppings" — and she notified him that the sample was insufficient and he would have to give her another one, "[b]ut [respondent] was on the cell phone which I asked him to shut off . . . He proceeded to tell me that he was unable to give a 2nd specimen because he had to leave and had a busy schedule. I notified [him] that I would have to notify his employer. (Which he said was fine and he walked out of the room with his ID card. I called the employment company @ 1:20pm and spoke with [Mr.] Montemurro and explained to him what happened and Mr. Montemurro said he would have to speak with his supervisor and I will be getting a call back." In that statement, Ms. Montalvo further relates that respondent returned at 4:16 p.m., and that she "[s]poke once again with Mr. Montemurro and he told me to proceed with the test. So I proceeded with the test (drugscreen) and I notified [respondent] that I was just following procedures."

Exhibit A-4 is a copy of a statement by Dr. Hoffman, dated November 9, 2007, in which he relates that his recollection of a phone conversation he had with respondent on June 15, 2007 was that respondent introduced himself, noted that he was a cardiologist, flight physician and pilot, and that respondent "explained that after he passed an insufficient specimen . . . on June 5, 2007, at 1:20pm he was told by the collector to provide another specimen, however; he did not want to wait to do so & wanted to come back later. He had to do something." Dr. Hoffman further stated that he explained to respondent that leaving the collection site before completing the collection process was a refusal to test, and that it was correctly reported as such. "He then asked if there was something we could do to rectify the situation since it would have substantial consequences for him. I explained there was nothing I could do to help him. Dr. Hoffman continued, "He then told me, he had called [the] FAA, who confirmed our position as a 'Refusal to Test'. I

also asked him why he left the collection site, when his prior training would probably have made him aware of the consequences before he left the collection site. He admitted he should have known better."

Exhibit A-6 is a copy of the employee handbook produced by Choice Point, entitled *Substance Abuse Training for the Workplace*. On page 11, under the heading Drug Test, the handbook states, "As an employee, you have refused to take a drug test if you: . . . . 2. Fail to remain at the testing site until the testing collection process is complete; . . . . 8. Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process)."

Exhibit A-7 is a Verification of Receipt, signed by respondent on April 18, 2005, for employee educational materials, which states, "I have been provided and have received a handbook on alcohol abuse and substance abuse in the workplace."

Exhibit A-5 is a copy of a Certificate of Completion from Choice Point, which certifies that respondent "completed and passed the final examination required by the CP [Choice Point)] Train web site training program on substance abuse and alcohol misuse" on May 3, 2005.

Exhibit A-9 is a copy of the June 15, 2007 affidavit that respondent transmitted to Ms. Greenberg by fax, in response to the LOI, on July 16, 2007. In that affidavit, respondent attested that he has been a Senior AME since 1987, and had been a professional pilot before becoming a physician. He further attested that he went to LabCorp's testing facility "after having consumed several cups of coffee at approximately 1:00 p.m. . . . . While I thought I had consumed sufficient coffee, apparently I had not and was unable to produce a sufficient amount of urine. I indicated that I would have to return; I had an applicant for an FAA medical and student pilot certificate scheduled to come to my office at 2:30. [Ms. Montalvo] asked when I was going to return, and I indicated it would probably be the following morning; I wanted to be certain I would have sufficient urine. She retained the chain of custody form." Respondent stated that, because his experience informed him that drugs being tested for linger in a person's system "[i]t seemed that something [i]n the order of 19 hours until the next morning would make no significant difference. Certainly, 3 hours would make less of a difference. . . . I had been given sufficient notice about the testing so that if I were going to adulterate the specimen, I would have been prepared to do that initially. . . . Given this rationale, [and] absent information to the contrary, it seemed not unreasonable and certainly not 'illegal' to have left and returned within a short period of time without penalty." Respondent further attested that he realized that he had a full bladder after his 2:30 AME appointment ended and he returned to LabCorp at approximately 4:00 p.m., and that, "[a]t that point I was told that because I left and returned, the collection site would have to get the approval of my company to receive the specimen," and that he ultimately provided the specimen and "left the collection site without the sense that there was any problem." However, "[t]oday, 15 June 2007, my company told me that the result reported to them was 'Refusal to Test.' I was outraged because I clearly refused nothing." Respondent attested that he made a number of phone calls in an attempt to get to the bottom of the matter, and that, during those calls, "I did ultimately find Subpart I. It was clear that, according to [49 C.F.R. §] 40.193(b)(3), my action constituted 'a refusal to test.' When I ultimately did speak with Dr. Hoffman, after seeing the appropriate regulation,

I really had not much to say. However, . . . I was not told that I could not leave; I was not told that it would be reported as a refusal; I was not, as specified in [§] 40.193(b)(2), urged to drink any fluid at all. Clearly, had I been provided with this information, given my 2:30 appointment, I would have had a dilemma. . . . I guarantee that I would have quickly consumed enough fluid to drown me in order to make my 2:30 appointment, and if I still could not provide sufficient urine within a time frame to make my appointment, I would have taken the criticism of failing to keep the appointment as opposed to the ramifications of a 'refusal.'"

Exhibit R-43 is a copy of respondent's T-Mobile cell phone bill for telephone number 917-239-1213, which lists the following calls for that number, for the afternoon of June 5, 2007:

Incoming	12:42 p.m.	1 minute
Incoming	3:57 p.m.	1 minute
Incoming	3:58 p.m.	1 minute
Incoming	4:09 p.m.	1 minute
Incoming	4:21 p.m.	1 minute
Incoming	4:23 p.m.	1 minute

III.

In response to the Board's remand directive, a factual and legal analysis appears below.

A. Evaluation of the Evidence

There were three percipient witnesses to the events that took place at the LabCorp testing facility between the time of respondent's initial arrival there on June 5, 2007 and his departure from that facility after he failed to produce an adequate urine specimen for testing — namely respondent, Ms. Montalvo and Ms. Santana. To the extent that those witnesses' accounts as to what occurred there diverge, I must resolve such differences, making credibility assessments where necessary.

The percipient witnesses do not controvert each other with respect to respondent's behavior at the time he was called back for testing at approximately 1:10 p.m., and it is clear from the testimony that respondent cooperated with Ms. Montalvo's instructions to empty his pockets, wash his hands, select a specimen cup, and proceed to the bathroom and provide a urine sample.

Respondent and Ms. Montalvo also agree that, after respondent returned from the bathroom with the inadequate urine specimen, Ms. Montalvo informed him that he would need to produce another one, and directed him to go to the facility's waiting area. However, their testimony differs as to whether she directed respondent to drink water, or even told him there was a water cooler in the waiting room. Ms. Montalvo's testimony, that she provided such direction and information to respondent, is corroborated by Ms. Santana's recollection as to what Ms. Montalvo told her immediately after respondent's departure. It is also more

credible than the testimony of respondent — whose life experience and background as a physician would (independent of anything he may or may not have been told by Ms. Montalvo) have imparted to him that he should drink water in order to accelerate the urinary process and increase his likelihood of producing an adequate second specimen. It would only seem logical that, even if Ms. Montalvo had not specifically informed respondent that there was a water cooler in the waiting area and directed him to drink from it, he would have asked whether there was a place on the premises where he could obtain water to drink. Thus, I also do not find credible respondent's testimony that he just sat in the waiting room, waiting for something to happen, and left when he came to realize that nothing was going to come about in the way of urine production.

As to the timing and circumstances of respondent's departure, Ms. Montalvo testified that, when she directed him to go to the waiting area, he told her that he had a busy schedule and could not wait, and that he took his ID, and left the facility. Both Ms. Montalvo and Ms. Santana testified that they observed that respondent departed in a rush. While respondent testified that he spent 10 to 15 minutes "there" — it is not wholly certain whether this refers to his total time at the LabCorp facility or solely to his time in the waiting area[4] — before leaving between 1:30 and 1:40 p.m., Ms. Montalvo noted, on both the CCF and her contemporaneous written statement, that she called Mr. Montemurro following respondent's departure from the facility, at 1:20 p.m., which would seem to corroborate that that he left very shortly after supplying the insufficient urine specimen. As I have previously noted, respondent's testimony that he sat in the waiting room waiting for something to happen with respect to urine production, without either drinking water or asking where he could get water to drink, is not believable. Taking into account both the weight of the evidence and the fact that, unlike respondent, Ms. Montalvo and Ms. Santana have no personal stake in the outcome of this case, I deem their testimony on this point to be more credible, and I find that respondent left LabCorp hurriedly at approximately 1:20 p.m., just 10 minutes after he began the testing process.[5]

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[4] *See* Tr. 425.

[5] Further evidence suggesting that respondent left LabCorp hurriedly is his testimony: (1) that he departed that facility *around one hour before his AME appointment*, which was eight or nine blocks away, and which he rode to by bicycle; and (2) that he decided to return to LabCorp to attempt to provide a second urine specimen after that appointment ended in part because he knew he was *only a few minutes from the testing site* by bicycle.

I note that, while Ms. Montalvo testified that respondent was talking on a cell phone when she called him back for testing and Ms. Santana testified that he was on a cell phone when he left the LabCorp facility, respondent has provided a T-Mobile cell phone bill which shows that he had no incoming or outgoing calls on 917-239-1213 after 12:42 p.m. and before 3:57 p.m. on June 5, 2007. While respondent was questioned on cross-examination as to whether he may have had a second cell phone in use that day, he denied this, and there is no evidence in the record to contradict him on that point. (The record also contains no evidence that respondent's 917-239-1213 cell phone may have had a feature that would not have showed up as an incoming or outgoing call on the T-Mobile bill.) Thus, it may be that Ms. Montalvo's and Ms. Santana's recollection of respondent's cell phone use at the testing facility came from the second visit he made to LabCorp after 4:00 p.m. Nevertheless, without regard to their testimony as to respondent's cell phone use, there is more than sufficient evidence to establish that respondent hurriedly left the testing site at approximately 1:20 p.m.

Regarding what information respondent was given before he left the LabCorp facility, I again note that there is no dispute that Ms. Montalvo failed to either provide him with "shy bladder" procedure instructions after he produced an insufficient urine specimen for testing or expressly inform him that he would be considered to have refused a drug test if he departed the facility without producing another urine sample. It is, however, significant that there was considerable testimony that respondent made it difficult, if not virtually impossible, for her to divulge such information to him by making his hasty departure. The "shy bladder" procedure instructions require some time to explain, and consistent evidence was adduced that Ms. Montalvo had just begun to give respondent instructions on what he would need to do after providing an inadequate urine specimen for testing when he abruptly and unexpectedly informed her that he had a busy schedule, could not wait and left the facility. Ms. Montalvo then had to suddenly change her mindset, from providing respondent with "shy bladder" information, to reacting to his swift and unanticipated departure.[6] Ms. Montalvo did tell respondent that she would have to inform his employer of his departure if he left, which would normally cause someone who believed he or she was doing nothing improper to inquire as to why that was necessary.[7]

Moreover, although respondent was not specifically told by Ms. Montalvo prior to departing the LabCorp testing facility that it would be deemed a drug test refusal if he left before providing another urine specimen, the evidence clearly establishes that he knew or should have known this before he left that site. To begin with, the evidence establishes that he took and successfully completed in 2005 — two years before the incident involved here occurred — training on substance abuse and alcohol misuse that was conducted for Northeastern pilots by Choice Point, and that, in connection with such training, he received a handbook that specifically informed him that, "As an employee, you have refused to take a drug test if you . . . . . [f]ail to remain at the testing site until the testing collection process is complete." In addition, respondent had lengthy experience as an MRO from 1990 to

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[6] In this regard, I must note my disagreement with the D.C. Circuit's view that respondent's hasty departure did not "preclude" Ms. Montalvo from telling respondent that his leaving the premises before he provided a second urine specimen would be considered a drug test refusal, since she had sufficient time to call after him to inform him that, if he departed, she would have to notify his employer (596 F.3d at 839). To the extent that Ms. Montalvo was reasonably surprised by respondent's sudden departure while her focus was on providing him with "shy bladder" information, it is thoroughly understandable and rational that she would have blurted out some form of warning that his departure could have adverse consequences without specifically uttering the "magic words" that it would constitute a refusal to test. On this point, I note the testimony of both Chief MRO Hoffman and Investigator Greenberg that Ms. Montalvo did all that she could have done, and did not mishandle the situation, in light of respondent's abrupt and unexpected departure from the testing site, and the testimony of Ms. Leamon, the manager of the FAA's Drug Abatement Division, that it was the act of leaving the facility that constituted a drug test refusal and that Ms. Montalvo's failure to tell respondent that it would be considered a refusal if he left did not vitiate that refusal. It is also significant that respondent's training and experience demonstrate that he independently knew or should have known that leaving the site of a drug test without providing an adequate urine specimen would constitute a refusal. *See* discussion, *infra*.

[7] I do not find credible respondent's testimony that Ms. Montalvo asked him when he would return to LabCorp, or that, upon his telling her that he would come back the next morning, she responded "Okay," or in any way signaled her approval.

2006, and must be charged with knowledge of drug testing procedures, including the consequences of leaving a testing facility before producing an adequate urine specimen for testing. I do not find credible respondent's testimony that he was unaware of the 2001 rule defining refusal and remained so throughout the last five years of his MRO service. Finally, it is significant that, according to Dr. Hoffman's November 9, 2007 statement and his hearing testimony, respondent related to him during a June 15, 2007 telephone conversation, when asked why he left the testing facility before providing a second urine specimen, that he "should have known better."

As a result of the above, I find that respondent, at the time he left the LabCorp testing facility without providing a second urine sample at approximately 1:20 p.m. on June 5, 2007, knew or clearly should have known that such behavior constituted a refusal to test. I also find that respondent left that testing facility without the permission or consent of anyone associated with LabCorp or Northeastern.

My assessment of respondent's overall credibility as a witness relies on several other noteworthy factors. First, I note that respondent failed to mention his MRO experience in either his June 15, 2007 affidavit or in his telephone conversation of that date with Dr. Hoffman, although he attested to his experience as a Senior AME in the affidavit and related such experience to Dr. Hoffman over the phone. Respondent's lack of disclosure of his MRO experience, which directly relates to his knowledge of the drug testing process, is suggestive of an effort on his part to conceal information of a highly relevant nature from persons whose evaluations of his behavior could become consequential, and is supportive of Ms. Greenburg's testimony that he denied having any MRO experience in response to a direct question she had asked him during her investigation of the matter.

In addition, some of respondent's testimony appeared to be internally inconsistent. For example, while he testified that he decided to go to LabCorp to provide a second urine specimen for testing around 4:00 p.m. on June 5, 2007, he also furnished testimony that he did not proceed to that facility for testing the previous day upon his receipt, after 4:00 p.m., of the preprinted CCFs that Ms. Schmitt had sent to him in the mail, because the LabCorp website stated that it did not conduct tests after 3:00 p.m. Further, as is noted above (*see* n.5, *supra*), while respondent provided testimony that it was necessary for him to leave the testing facility approximately one hour before his AME appointment, in order to make that appointment on time and prepare for it, he also testified that that one reason he decided to return to LabCorp — by the same means of transportation — to provide the second specimen after the AME appointment ended was that it was only a "couple of minutes" away.

It also seems not entirely believable that respondent, who testified that he "was about to go urinate" because he "had the urge to urinate" when his AME appointment ended, would have reasonably thought that he could delay voiding throughout the entire time it would take him to exit his office building, ride his bicycle for eight or nine blocks, arrive at the LabCorp facility, check in and be called back for testing there.

My overall assessment of respondent as a witness — having carefully listened to and reviewed his testimony, and having observed his demeanor at the hearing — is that he was evasive and, in significant ways as discussed above, inconsistent and not credible.

I find Ms. Montalvo and Ms. Santana to be more credible witnesses than respondent as to the events that took place at LabCorp's testing facility on June 5, 2007.

I further find that Dr. Samuels, Dr. Hoffman, Mr. Jordan, Mr. Montemurro, Ms. Greenberg and Ms. Leamon were credible witnesses regarding the matters to which they testified, and that Dr. Lester was a credible witness, although her testimony was not crucial to the disposition of this case.

B. Role of DOT Collection Guidelines

In response to a request for production of documents, respondent, through counsel, provided to the Administrator, on March 6, 2008, a copy of selected portions of DOT's *Urine Specimen Collection Guidelines* (as revised in December 2006). No part of that document was admitted into evidence at the hearing in this matter. However, the Board, in its remand order (NTSB Order EA-5545 at 12-13), asked that I make findings as to whether those DOT Guidelines "were binding on the Administrator and thus Ms. Montalvo (although the guidelines do not appear in the regulations themselves), and, if they were binding, whether Ms. Montalvo followed the proper testing procedures. . . . [In addition, i]f th[is] judge finds the . . . Guidelines were binding on Ms. Montalvo, we . . . request that [he] provide us with his conclusions of law as to what effect, if any, those guidelines have on the outcome of this case."

The relevant portion of the DOT Guidelines appears under the heading, SECTION 7. SHY BLADDER PROCEDURES (at 18-19):

> * * * * *
>
> 2. If the employee provides an initial insufficient specimen, the collector discards the insufficient specimen. The collector annotates in the "Remarks" line [of the CCF] the time when the employee provided the insufficient specimen. This is the time when the "shy bladder" collection process starts.
>
> * * * * *
>
> 3. The collector explains to the employee the process for a shy bladder collection and urges the employee to drink up to 40 ounces of fluids, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. . . .
>
> * * * * *
>
> 4. If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is completed, the collector must discontinue the collection, note the facts on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

I note that there is nothing in the portion of the Guidelines that was provided which sets forth any specific language the collector is to use to communicate to the employee

that, if he or she leaves the collection site before the collection process is completed, it will be considered a test refusal.[8]

In *Administrator v. Heyl*, NTSB Order EA-5420 (2008), the respondent produced two inadequate urine specimens and then left the testing site without providing an adequate sample. His principal defense was that the collection facility's handling of the collection procedure was contrary to its policies and DOT requirements (NTSB Order EA-5420 at 11). There, "after [t]he [respondent] provided two separate urine specimens, the collectors at the [site] notified him that he had not provided a sufficient amount of urine, and that he needed to wait in the waiting room and eventually provide another specimen" (*id.* at 12). While he claimed that he asked, and was granted, permission to leave the facility by a member of the collection site's staff, the Board found that "the greater weight of the probative evidence [was] that he knowingly left the testing site without providing a sufficient sample, and without authority" (*id.* at 14). It also appears that the respondent was not specifically informed prior to leaving that he would be found to have refused testing if he left (*see id.* at 13-14). The Board affirmed the judge's finding that the respondent's behavior constituted a refusal to submit to a drug test under 49 C.F.R. § 40.191(a)(2).

In *Administrator v. King*, NTSB Order EA-4997 (2002), the respondent was unable to produce a sufficient urine specimen in four attempts during a period of three hours and two minutes, and the Administrator revoked his certificate on the basis that this constituted a test refusal. The hearing judge reversed the Administrator's order, in part because the collector "had not advised the respondent to drink up to 40 ounces of water" (NTSB Order EA-4997 at 4), and "[t]he Administrator . . . argued that the . . . judge erred by concluding that the collection process was fatally flawed because the collector, albeit recommending that respondent drink some water to remedy his apparent difficulty in providing a specimen, may not have specifically told him he could or should drink up to 40 ounces of water" (*id.* at 5). The Board observed (*id.* at 6-7 (emphasis original, footnotes omitted)):

> We recognize that the U.S. Department of Transportation regulations applicable to the testing performed in this case direct the collector to "urge the employee to drink up to 40 ounces of water, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first . . ." (49 CFR Section 40.193(b)(2)). There is, however, no basis in the regulatory history for concluding that a test should be invalidated if the collector did not himself dispense to the respondent measured cups of water totaling 40 ounces, as the . . . judge suggests he needed to do, and there is no showing on this record that such a procedure is utilized by those performing drug testing for [the employer of respondent in this case] or anyone else. Moreover, the regulatory history does not suggest that 40 ounces was selected because of any judgment that drinking that quantity of water would produce any specific amount of urine for a specimen. Rather, it was selected essentially as a *cap* on the amount of water an individual should consume without raising concerns over water intoxication or dilution of a specimen. *See* 61 Fed. Reg. 37693 (1996).

[8] Similarly, there is no provision in 49 C.F.R § 40.191 that sets forth any specific language to be used by the collector in such a situation.

> There is no indication that . . . [the] respondent . . . did not appreciate the direct biological relationship between the consumption of liquids and the production of urine. In any event, it was respondent's responsibility, as a transportation worker engaged in a safety-sensitive function, to allow himself to be tested for drug use that could affect his ability to safely perform his job. His failure, without medical justification, to discharge that responsibility was in no way, logically or legally, attributable to anything the collector did or did not do, and it constituted a refusal to submit to testing, in violation of regulations, notwithstanding the . . . judge's assessment that the testing protocol could be read to require a more structured process than occurred in this instance or than, so far as this record shows, ever occurs.

It would, thus, appear that, in cases it has previously considered, the Board neither found the DOT Guidelines to be binding on the collector, nor taken the position that a failure on part of the collector to either — (a) strictly follow the Guidelines, in terms of expressly providing a person being tested with the "shy bladder" procedure, as stated therein, or (b) specifically inform any such individual, prior to leaving the testing facility before providing an adequate specimen, that doing so would constitute a refusal — somehow invalidates the testing process or exculpates the person being tested from the consequences of his or her failure to comply with the regulations.

C. Findings of Fact

I make the following findings of fact, as sought in the Board's remand:

1. Respondent appeared at the LabCorp testing facility for random drug testing at approximately 1:00 p.m. on June 5, 2007.

2. Respondent was called back for testing at that facility at approximately 1:10 p.m. He cooperated with Ms. Montalvo's instructions to empty his pockets, wash his hands and select a specimen cup. He proceeded to the bathroom and provided a urine sample.

3. The urine specimen respondent produced measured less than 45 mL, which was inadequate for testing.

4. Respondent was then instructed by Ms. Montalvo to go to that facility's waiting area and drink water from the water cooler located there.

5. Before Ms. Montalvo could provide any further information or instructions to respondent, he abruptly told her that he could not wait, and would have to leave.

6. Respondent then departed, and, as he was on his way out, Ms. Montalvo told him that she would have to inform his employer of his departure.

7. Respondent left the LabCorp facility at approximately 1:20 p.m., without the permission or consent of anyone associated with LabCorp or Northeastern.

8. Ms. Montalvo did not provide respondent with the specific "shy bladder" instructions appearing in the DOT Guidelines and 49 CFR § 40.193 after he produced his first, inadequate, urine specimen and before he left the LabCorp facility.

9. Ms. Montalvo did not specifically inform respondent before he departed the LabCorp facility that, if he did so before producing another urine specimen, he would be considered to have refused a drug test.

10. Respondent did not fail to cooperate with any part of the testing process at LabCorp. by doing things such as refusing to empty his pockets or wash his hands, or behaving in a confrontational way that disrupted the collection process.

11. Respondent is a physician. He had lengthy experience as a Senior AME and an MRO. He served as an MRO for approximately 16 years, from 1990 to 2006.

12. As a pilot for Northeastern, respondent received and successfully completed, in 2005, training on substance abuse and alcohol misuse from Choice Point. Such training included instruction that leaving a drug testing facility without providing an adequate urine specimen constitutes a drug test refusal.

13. By virtue of both such training and his experience as an MRO, respondent knew or should have known that he was, under the applicable regulations, refusing a drug test when he departed the LabCorp drug testing facility at approximately 1:20 p.m. on June 5, 2007.

D. Conclusions of Law

Based on the above findings of fact, I make the following conclusions of law:

1. Respondent did not refuse to take a DOT drug test under the provisions of 49 C.F.R. § 40.191(a)(8) on June 5, 2007.

2. Respondent refused to take a DOT drug test under the provisions of 49 C.F.R. § 40.191(a)(2) on June 5, 2007.

3. Respondent's rebuttal/exculpatory defense, that he should not be considered to have refused a DOT drug test under 49 C.F.R. § 40.191(a)(2) on June 5, 2007, because he was, at the time he left the LabCorp testing facility without providing a second urine specimen, without knowledge that his departure would constitute a drug test refusal, has no valid basis under the facts of this case.

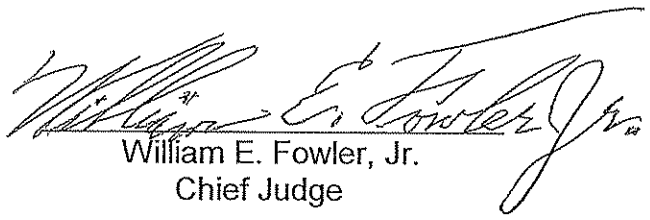
4. Respondent, by virtue of his refusal to take a DOT drug test on June 5, 2007, has demonstrated that he lacks the qualifications required to hold, and exercise the privileges of, any certificate or rating issued under FAR Part 61.

5. Safety in air commerce or air transportation and the public interest require the revocation of respondent's ATP, flight instructor and ground instructor certificates.

THEREFORE, IT IS ORDERED that the Oral Initial Decision, issued on July 31, 2008, is modified and supplemented as set forth above, and the Administrator's second amended order of revocation, issued on May 28, 2008 is AFFIRMED insofar as it found that respondent refused a Department of Transportation drug test on June 5, 2007 under 49 C.F.R. § 40.191(a)(2) and REVERSED insofar as it found that respondent refused a Department of Transportation drug test on June 5, 2007 under 49 C.F.R. § 40.191(a)(8); and

IT IS FURTHER ORDERED that the Administrator's revocation of respondent's airline transport pilot, flight instructor and ground instructor certificates is hereby AFFIRMED.

Entered this 8th day of April 2011, at Washington, D.C.



William E. Fowler, Jr.
Chief Judge

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	*	
	*	
ROBERT A. STURGELL,	*	
ACTING ADMINISTRATOR,	*	
Federal Aviation Administration,	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-18133
	*	JUDGE FOWLER
FRED LEROY PASTERNACK,	*	
	*	
Respondent.	*	

General Services Administration
26 Federal Plaza
Courtroom 238
New York, New York 10278

Thursday
July 31, 2008

The above-entitled matter came on for hearing, pursuant to Notice, at 9:30 a.m.

BEFORE: WILLIAM E. FOWLER, JR.,
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

JAMES CONNEELY, Esquire
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

On behalf of the Respondent:

GREGORY S. WINTON, Esquire
Yodice Associates
601 Pennsylvania Avenue
Washington, DC 20004

ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was subsequently amended, on the appeal of Fred Leroy Pasternack from an amended Emergency Order of Revocation, dated May 20, 2008, which seeks to revoke the airline transport pilot

certificate, the flight instructor's certificate number (omitted) of Respondent Pasternack, as well as his ground instructor's certificate number (omitted).

The Administrator's Emergency Order of Revocation, as duly promulgated, pursuant to the National Transportation Safety Board's Rules of Practice, was issued by the Enforcement Division of the Chief Counsel's Office, of the Federal Aviation Administration.

This matter has been heard before this United States Administrative Law Judge and, as provided specifically by the Board's Rules of Practice in Air Safety Proceedings, even though the emergency aspects of this proceeding has been waived by the Respondent, I am still going to issue an oral initial decision at this time so as to comport and comply with the Board's direction to the judges to try to dispose of this case finally within the sixty-day period. That is no longer applied because the emergency aspects have been waived, as I mentioned a moment ago.

Following notice to the parties, this matter came on for trial on July 30th and 31st in New York City. The Respondent, Dr. Fred Leroy Pasternack, was present at all times and was very ably represented by Gregory Winton, Esquire. The Administrator, sometimes referred to as the Complainant in this proceeding, was likewise very well represented by James Conneely, Esquire, of the Federal Aviation Administration.

Both parties have been afforded the opportunity to offer evidence, to call, examine, and cross-examine witnesses. In addition, the parties have been afforded the opportunity to make argument in support of their respective positions.

DISCUSSION

During the course of this proceeding, we have had nine witnesses adduced by the Administrator, two, I believe, by the Respondent. The Administrator has adduced ten documentary exhibits, which have been duly admitted into the hearing record as it is presently constituted. The Respondent has had a number of exhibits, let me just say, in excess of 20. I have taken judicial notice of a number of Respondent's exhibits which were not admitted in evidence.

I have reviewed the testimony and the evidence in this proceeding. I just mentioned the number of witnesses that we've had. The paramount, central, and overriding issue in this proceeding, why we are here, is that the Respondent refused a valid drug test as the Administrator has set forth in his amended Emergency Order, required under Part 121, Appendix I.

I have reviewed the testimony and the evidence here. It is my conclusion and determination that the Administrator's case is not only persuasive, but it is compelling. The nine witnesses that the Administrator has adduced, starting with witness Schmitt, Montalvo, Samuels, Hoffman, some of these witnesses are doctors.

It comes down to my final determination that the Administrator was validly premised in bringing this action.

It's an unfortunate case, because here we have, in the Respondent, an exceedingly qualified and diversified gentleman, who is not only an airman, he has been a medical review officer and he has been a designated medical examiner.

I don't think I've ever heard a case where the Respondent has had all of this background and training. Now you get the drift of why I say it's unfortunate, because certainly Respondent Pasternack in no way could be deemed not a knowledgeable airman. Simply and solely, he made a mistake. He made a mistake when he left the laboratory where he was undergoing a drug test.

The Administrator's case could rise or fall. It doesn't, but it could rise or fall on three exhibits. A-3, which is the custody and control form that Theresa Montalvo made, she states it all here that Respondent came in, under the remarks section, at 1:00 p.m. He left at 1:20 p.m. He left before he was told to wait in the waiting room, after he had given an insufficient specimen. He returned at 4:00 that same day, as Ms. Montalvo has written here in this custody and control form as set forth in Administrator's Exhibit A-3. He returned at 4:00 the same day, submitted a substantial specimen, which turned out to be negative.

But, as I mentioned earlier here, the real issue here is did the conduct of Respondent Pasternack constitute a refusal to take the test. The FAA says it did, the cases are legion to that effect.

The FAA has brought an action under the apropos sections of the Federal Aviation Regulations that state and, as I mentioned, the cases are legion that any refusal, as we have here, to take the test by Respondent leaving the immediate testing premises without permission, even though he had been told to wait in the waiting room.

I can understand he was under time pressures. He had an appointment at 2:30 and he didn't think twice that anything would come of it, of him leaving. But, in addition to the custody and control form, being very material, pertinent, and relevant to the Administrator's case, we have the affidavit, itself, by Respondent Pasternack, Administrator's Exhibit A-9. Wherein, he says his part of the phone calls that he had, he says, and I quote, "during these many phone calls, I did ultimately find Subpart I, it was clear," and I'm quoting his affidavit now, as he stated, "it was clear that according to 40.193(b)(3), my action constituted a refusal to take the test."

You may recall during the testimony of Dr. Hoffman, the chief medical review officer, that during Dr. Hoffman's testimony, he stated, the Respondent stated to him, "that he should have

known better." This is Dr. Pasternack's statement to Dr. Hoffman and Dr. Hoffman alluded to it during his, Dr. Hoffman's, testimony.

So we could stop right there and find that the evidence that I mentioned, Exhibits A-3 and A-9, would be sufficient, in my estimation. Dr. Hoffman's statement about Respondent Pasternack's statement to him is also set forth in Administrator's Exhibit A-4, which is the statement of Dr. Hoffman, which alludes to this.

If there was ever any question in this case for air safety sensitive functions and the positions that those functions applied to, I think Captain Jordan testified voluminously and extensively on all the possibilities and exceptions thereof. I am not going into at this time what he said in-depth. But he covered what could and could not be applied where eligible individuals would be subject to the drug test, as Respondent Pasternack was.

He mentioned, of course, during his testimony, that Respondent, at the time of the test of June 5th, 2007, was lacking some requisite ground training and, thus, lacking currency.

Now we have had a wealth of testimony, in opening statements, and in final argument by both extremely learned, diligent, and industrious counsel involved in this case, on what is involved and what is not involved, where people, pilots, airmen, mechanics, where air safety functions are concerned.

Counsel for Respondent, Mr. Winton, has put on an

extremely able and competent defense for his client. He has taken the position that, in this instance, the apropos FAA regulation has been misapplied to his client.

Unfortunately, for him and his client, as I stated a few minutes ago, the evidence, in my determination, adduced by the Administrator is almost overwhelming. If not, certainly, it is compelling and extremely persuasive to the contrary point of view, as opposed to Respondent's position.

This is the type of case that perhaps could go before, and I had the pleasure of hearing him less than a week ago, the Honorable Justice Anton Scalia and his colleagues in the United States Supreme Court.

But as a judge in this proceeding, I am bound by the applicable and apropos law, rules, and regulations, as they are validly promulgated by the Federal Aviation Administration and validly interpreted, as at least at this juncture I deem they are and have been, and I have to apply them accordingly.

As I said and I think I have expressed my analysis, I can see both sides of the picture here in this proceeding. This may be a case of first impression. I believe that it is, and one that could, and very well may be, decided in an opposite respect ultimately to my decision.

But as I mentioned earlier, I have to determine and conclude, as I have, that the second amended Emergency Order of

Revocation lodged against Dr. Fred Leroy Pasternack was validly premised.

The evidence here is more than ample that the Administrator has adduced that all fourteen paragraphs of the Administrator's amended Emergency Order of Revocation has been successfully proven by the material, relevant, and probative evidence that has been adduced here, during the course of this two-day proceeding, before this Judge.

So I will now proceed to make the following specific findings of fact and conclusions of law:

1. The Respondent admits and it is now found that at all times mentioned, pertaining to this document, the Emergency Order of Revocation, that the Respondent was and is the holder of airline transport pilot and flight instructor certificate number (omitted), and ground instructor's certificate number (omitted), issued under 14 CFR, Part 61.

2. It is found that during the events identified in this document, Respondent Fred Leroy Pasternack was employed on a part-time basis to perform flight crewmember duties for Northeastern Aviation Corporation, hereinafter referred to as Northeastern.

3. It is found that Northeastern is the holder of air carrier certificate number AOY8206C, issued pursuant to Part 135 of the Federal Aviation Regulations, and is now and was at all

times mentioned in this document an employer within the meaning of 14 CFR, Part 121, Appendix I, Section 2.

4. It is found that under Part 121, Appendix I, Section 3, each employee who performs a safety sensitive function for an employer must be subject to drug testing under the anti-drug program implemented in accordance with the aforesaid section.

5. It is found that under this section, flight crewmember duties are safety sensitive positions.

6. It is found that under Part 121, Appendix I, Section 2, a refusal to submit means that the covered employee engaged in conduct specified in 49 CFR, Part 40.191.

7. It is found that under 49 CFR, Part 40.191(e), Respondent is considered to have refused to take a drug test, "if you" -- and I incorporate by reference the following Paragraphs 1 and 2, as set forth under Allegation Paragraph 7 of the Administrator’s Emergency Order.

8. It is found on Friday, June 1, 2007, Respondent was notified by Northeastern that he was selected for a random drug test and instructed to proceed to Lab Corp for collection of a specimen.

9. It is found that Respondent informed the designated employer representative that he could not proceed to Lab Corp because he did not have a copy of the federal drug testing custody and control form.

10. It is found that Respondent Pasternack reported to the Lab Corp on Tuesday, June 5, 2007, to provide a specimen for a random drug test.

11. It is found that on June 5, 2007, on or around 1:00 p.m., and I am incorporating by reference, Subparagraphs A, B, C, D, and E, under Paragraph Allegation 5.

12. It is found by reason of the foregoing, Respondent Fred Leroy Pasternack refused to take a drug test as required under Part 21, Appendix I, of the Federal Aviation Regulations.

13. It is found that 61.14(b) does specify that a refusal by the holder of a certificate issued under Part 61 to submit to a drug test required under 14 CFR, Part 21, Appendix I, is grounds for revocation of any certificate or rating held under Part 61.

14. It is found that by Respondent's actions described above, Respondent has demonstrated that at least, at this present time, he appears to lack the qualifications required to hold and exercise the privileges of an airman certificate.

15. It is found that, based on the foregoing, the Federal Aviation Administrator has determined, pursuant to 49 U.S.C., 44.709(b), that safety in air commerce, and air transportation, and the public interest does require the revocation of Respondent's airline transport pilot's certificate and flight instructor's certificate number (omitted), and

Respondent's ground instructor's certificate number (omitted).

16. This Judge finds that safety in air commerce, and air transportation, and the public interest does require the affirmation of the second amended Emergency Order of Revocation dated May 20, 2008, issued by the Federal Aviation Administrator in view of the aforesaid violations as I have set forth earlier in this decision.

ORDER

IT IS ORDERED AND ADJUDGED that the Administrator's amended Emergency Order of Revocation, dated May 20, 2008, be and the same is hereby affirmed.

This order is issued by:

_____

DATED & EDITED ON
AUGUST 20, 2008

WILLIAM E. FOWLER, JR.
Chief Administrative Law Judge